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No. 97-532

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

PACESETTER CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

CARPENTERS 46 NORTHERN CALIFORNIA COUNTIES
CONFERENCE BOARD,
Respondent.

Petition For A Writ Of Certiorari To The United States Court
Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Pursuant to Rule 15.6 of the Rules of the Supreme Court of the United States, Pacesetter Construction Company (hereafter "Pacesetter" or "Petitioner"), hereby replies to new points raised in opposition to its petition for a *writ of certiorari* to review the Ninth Circuit's most recent decision in this case. In particular, Pacesetter takes issue with the Carpenters 46 Northern California Counties Conference Board's (hereafter "Respondent" or "Union") misinterpretation of a recent Second Circuit decision which confirms the existence of a growing split in the circuits

regarding the applicability of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995) to arbitration review cases arising under Section 301 of the Labor Management Relations Act, 29 U.S.C. §185.

ARGUMENT

A. Pacesetter Did Not Clearly and Unmistakably Agree to Submit and Be Bound By the Arbitrator's Determination Regarding Arbitrability.

In an attempt to minimize the impact of the Ninth Circuit's determination not to apply the holding of *First Options* to the facts of this case, Respondent asserts erroneously that even if the Ninth Circuit had applied *First Options*, it would have reaffirmed its previous decision. Specifically, Respondent contends that the "undisputable facts established that Pacesetter clearly and unmistakably agreed to submit the dispute to the Arbitrator. Thus, the requirements of *First Options* are met." Oppos. Brief, p. 2. Respondent contends that Pacesetter has "blatantly misled" the Court by arguing that it repeatedly objected to the arbitrability of the Union's grievance "on the ground that it was not a party to the contract with the Union." Oppos Brief, p. 2.

Both at the outset and throughout the hearing before the Board of Adjustment, Pacesetter vigorously argued, that no contract existed between the parties and that Pacesetter had repudiated the contract in 1975.[1/] Petition, App., 7a-8a.[2/]

[1/] The first substantive words out of the mouth of Pacesetter at the arbitration were the following: "I'm going to object to the continuation of this testimony until there's a showing that there's a contract." (See Petitioner's Excerpts of Record on Appeal to the Ninth Circuit, filed February 1, 1994, Ex. C, "Transcript of

(continued...)

In *First Options*, this Court mandated that a court must apply "ordinary state-law principles that govern the formation of contracts," in determining whether a party has "clearly and unmistakably" entered into an agreement to arbitrate arbitrability. *First Options*, 131 L.Ed.2d at 993-994. For example, the Court cited to relevant state law which required a court to assess whether the parties objectively revealed an intent to submit the arbitrability issue to arbitration." *Id.* at 993.

In California, the "true implied contract. . . consists of obligations arising from a mutual agreement and intent to promise where the agreement and promise have not been expressed in words." *Silva v. Providence Hosp. of Oakland*, 14 Cal.2d 762,773, 97 P.2d 798 (1939). An implied contract "is consensual in nature." *Pasadena v. Los Angeles*, 118 Cal.App.2d 497, 499, 258 P.2d 28 (1953). As with any contract, its elements include not only consent, but a lawful object and consideration. California Civil Code §1550. The Ninth Circuit applied neither these nor any other principles of contract formation.

At the very most, Pacesetter's conduct at the hearing was ambiguous. Where, as here, a party challenges the very existence of a contract, ambiguity cannot overcome a presumption that the party did not intend to submit and be bound by an arbitral determination regarding jurisdiction. *First Options*, 131 L.Ed.2d at 994. To rule otherwise undermines both the consensual nature of arbitration and the consensual nature of contract formation under California law.

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[1] (...continued)
January 14, 1992 Hearing Before Carpenters 46 Northern California Conference Board," p. 7:13-15.)

[2] "App." refers to the Appendix attached to Pacesetter's opening Petition for Writ of Certiorari.

B. The Holding of *George Day* Cannot Be Harmonized With The Holding of *First Options*.

Respondent does not appear to dispute that rather than applying state law principles of contract formation, the Ninth Circuit unilaterally imposed an agreement upon Pacesetter based solely upon conduct occurring at the arbitration hearing. Rather, Respondent contends that the "implied consent doctrine" of *George Day Constr. v. United Broth. of Carpenters*, 722 F.2d 1471 (9th Cir. 1984) -- followed by the Ninth Circuit in the decision below -- further defines "what constitutes clear and unmistakable evidence of an agreement" to arbitrate arbitrability and is thus fully consistent with *First Options*. Oppos. Brief, p. 2, 26-27.

As discussed in Pacesetter's opening Petition (pp. 13-14), in *George Day*, the employer challenged arbitrability on the ground that the dispute did not arise under an expired collective bargaining agreement. The Ninth Circuit held that a party's failure to either object to the arbitrator's authority and refuse to argue the issue or object to jurisdiction and expressly reserve the question on the record constituted a party's "implied consent" to submit the arbitrability issue to the arbitrator and to waive independent judicial review. *Id.* at 1475.

This so-called "implied consent" doctrine is not consistent with the holding of *First Options*. Indeed, quite the opposite is true. Under *First Options*, absent clear and unmistakable evidence of a contract to arbitrate arbitrability the court must presume the challenging party intended to preserve the question of arbitrability for independent judicial review. This standard is directly at odds with the *George Day* standard that places the burden on the party challenging arbitrability to make "clear that it did not want the arbitrator to exercise jurisdiction over its dispute" in the first place. App., 14a.

If *George Day* has any viability at all after *First Options*, it is only when a party's challenge to arbitrability rests either on the assertion that a particular grievance is outside the scope of the agreement;[3] or on the assertion that a post expiration grievance did not arise under an expired or terminated collective bargaining agreement. Nowhere is this more clearly illustrated than in the Second Circuit's decision in *Abram v. Landau Real Estate v. Benova*, 123 F.3d 69 (2nd Cir. 1997), cited by Respondent in its opposition brief. Oppos. Brief, p. 21.[4]

In *Abram Landau*, the Court of Appeals for the Second Circuit carefully analyzed the effect of *First Options* in the context of a labor dispute involving an expired collective bargaining agreement. In rejecting the applicability of *First Options* to the particular facts of that case, the Second Circuit concluded that *First Options* has no viability where a party challenging arbitrability bases that challenge on the fact that a collective bargaining agreement has allegedly expired. The appellate court noted that in the case of an expired agreement:

> [T]he parties' dispute is not really over what an arbitration clause provides; rather, it is a dispute over the interpretation of other clauses of the collective bargaining agreement, e.g., termination clauses, or in [plaintiff's] case, an 'evergreen clause.'

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[3] As noted by this Court, when a party disputes that a particular merits-related dispute is not within the scope of a valid arbitration agreement, the law presumes that the dispute is arbitral. *First Options*, 131 L.Ed 2d at 994.

[4] The *Abram Landau* case was decided on August 15, 1997, shortly before Pacesetter's petition for *writ of certiorari* was filed, and was not discussed in Petitioner's analysis of the case law applying *First Options* in the labor arena.

Id. at 73. Citing *First Options*, the Second Circuit reasoned that in contrast, where the parties dispute the very existence of an agreement to arbitrate, whether the parties are bound by the arbitration agreement is a question of arbitrability that should be decided by the courts, absent clear and unmistakable evidence of an agreement between the parties to submit the question to arbitration. The Second Circuit specifically noted:

> We read *First Options* as a clarification of the type of evidence needed to submit to arbitration a dispute regarding whether parties ever entered into a valid arbitration agreement at all.

Id. at 73.

Respondent contends that the facts of this case are analogous to the facts of *Abram Landau* and therefore, *First Options* is inapplicable. Oppos. Brief, p. 23. Specifically, Respondent asserts that, like the parties in *Abram Landau*, the parties in this case do not dispute whether they entered into a valid arbitration agreement, but rather dispute whether Pacesetter repudiated the contract, a scenario equivalent to that of contract termination or expiration. *Ibid.* Respondent misapprehends the nature of pre-*Deklewa* repudiation under Section 8(f) of the NLRA.

As a matter of law, the repudiation of a contract is equivalent to the denial of its existence. To be more precise, repudiation is the "rejection, disclaimer or renunciation of a contract before performance is due. . ." *Black's Law Dictionary* 1303 (6th ed. 1990). It is not analogous to a dispute regarding the impact of a termination clause on arbitrability.

The holding of *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190, 205-206, 111 S.Ct. 2215, 115 L.Ed.2d 177, 196-197 (1991) illustrates this point. In *Litton*, this Court held that the duty to arbitrate outlives

an expired collective bargaining agreement where: the grievance involves facts or occurrences that arose before expiration; the action taken after expiration infringes a right that vested before expiration; or under normal principles of contract interpretation, the disputed right survives the contract's expiration. These are issues which involve either a factual assessment of timeliness or an interpretation of provisions in the collective bargaining agreement -- both tasks properly suited for an arbitrator's assessment.

In contrast, as the Ninth Circuit has recognized, a party's contention that it has repudiated a Section 8(f) agreement does not present a question of contract interpretation to be decided by an arbitrator. Rather, it raises a legal question more appropriately decided by the courts. *Camping Construction v. District Council of Ironworkers*, 915 F.2d 1333, 1338 (9th Cir. 1990), *cert denied*, 500 U.S. 905 and 500 U.S. 953 (1991).

In summary, *George Day* cannot be harmonized with the holding of *First Options*. As implicitly recognized by the Second Circuit in *Abram Landau*, *George Day's* "implied consent" doctrine is simply inapplicable where the party challenging arbitrability repeatedly contends -- by repudiation or otherwise -- that a contract does not exist. The Ninth Circuit's reliance on *George Day* in the decision below is in direct conflict with the decision of this Court in *First Options*.

C. *Abram Landau* More Clearly Illustrates the Split in the Circuits Developing as a Result of the Ninth Circuit's Refusal to Apply First Options in Section 301 Cases.

Respondent makes much of the fact that in *Abram Landau*, the Second Circuit declined to directly address the Ninth Circuit's position -- as reflected in *United Brotherhood of Carpenters v. Desert Palace Inc.*, 94 F.3d 1308 (9th Cir. 1996) and *Pacesetter*, 116 F.3d 436 (9th Cir. 1997) -- that *First*

Options has no applicability in the context of a labor dispute. Oppos. Brief, p. 22. Instead, the Second Circuit commented that it need not "go as far," as the case before it fell outside the scope of *First Options*. *Id.* at 74.

Respondent contends that this language indicates that there is no split in the circuits regarding the application of *First Options* in the labor context, and that in fact, the Ninth Circuit is the only circuit that has addressed whether *First Options*, as a commercial arbitration case, should apply to cases that arise under section 301 of the LMRA. Oppos. Brief, p. 18. However, in the same breadth, Respondent notes that the Second Circuit, in the context of a Section 301 action, "limited *First Options* to the single arbitrability issue of whether the parties ever entered into a valid arbitration agreement at all." Oppos. Brief, p. 22.

Clearly, the Second Circuit not only applied but assessed astutely the impact of *First Options* within the context of a labor arbitration dispute. Moreover, contrary to Respondent's erroneous assertion to the contrary, Oppos. Brief, pp. 19-20, the Sixth Circuit in *Aircraft Braking Systems Corp. v. Local 856, UAW*, 97 F.3d 155 (9th Cir. 1996), *cert. den.* ___ U.S. ___, 117 S.Ct. 1311, 137 L.Ed.2d 475 (1997), applied *First Options* without hesitation in the context of a Section 301 action. *Id.* at 160; *see also Local 744, International Brotherhood of Teamsters v. Hinckley & Schmitt, Inc.*, 76 F.3d 162 (9th Cir. 1996); *Excel Corp. v. United Food and Commercial Workers*, 102 F.3d 1464, 1467 (8th Cir. 1996); Petition, pp. 22-25.

Thus, there is an ever widening split in the circuits regarding the applicability of *First Options* in the context of a labor dispute with the Ninth Circuit on one side of the chasm and all the other circuits who have addressed the issue on the other. Accordingly, this Court may grant Pacesetter's petition for a *writ of certiorari* on the ground that the decision below is in direct conflict with the decisions of at least four other circuits

that have applied *First Options* in disputes arising under Section 301 of the LMRA.

D. There are No Fundamental Differences in Policy Which Justify The Imposition of an Agreement to Arbitrate on an Unwilling Party.

Respondent asserts that the Ninth Circuit was justified in relying solely upon amorphous "fundamentally different policy concerns" between commercial and labor arbitration in determining that *First Options* has no viability in the labor arena. App., 12a. In essence, Respondent contends that labor and commercial arbitrations are governed by different statutes, that *First Options* merely cited "a few fundamental labor arbitration cases," and that the holding of First Options would have disastrous consequences for the collective bargaining process. Oppos. Brief, pp. 7-16. Respondent's characterization of the alleged policy differences applicable in this case and its description of *First Options* and that case's purported death knell effect on labor arbitrations is inaccurate to the say the least.

As previously noted, Petition pp.10-11, in *First Options*, this Court did not merely "cite a few labor cases," but rather reaffirmed and further refined the basic principles for judicial review of arbitration decisions articulated in forty years of Section 301 precedent. Further, the policy underlying the FAA is identical to the policy underlying judicial review in the Section 301 context: in both arenas, arbitration is favored. *Southland Corp. v. Keating*, 465 U.S. 1,10, 104 S.Ct. 852, 858, 79 L.Ed.2d 1 (1984).

Moreover, the application of *First Options* to labor arbitration cases where the party disputes the very existence of a contract to arbitrate presents neither a threat to the federal policy favoring arbitration nor infringes upon the arbitrator's role as the parties' agreed-upon contract interpreter. The dispute underlying this case does *not* involve a question of contract

interpretation where the arbitrator is required to "fill the gaps" for the vast array of circumstances that have not been considered or reduced to writing. App, 12a, citing *Desert Palace*, 94 F.3d at 1311. Rather, it involves the narrow legal question of whether a contract existed between the parties. Quite simply, Respondent has described no federal labor policy which favors the unilateral imposition of a labor contract upon a party who consistently disputes the existence of that contract.

CONCLUSION

Pacesetter respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit and remand the case for further proceedings consistent with the Court's October 2, 1995 Order in this case, and consistent with the Court's decision in *First Options*.

Respectfully Submitted,

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